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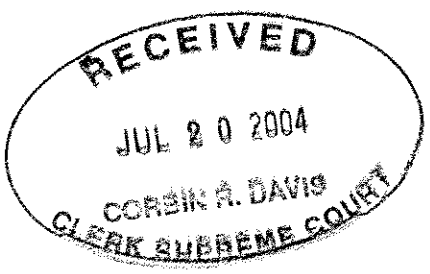

RE: Adm File No. 2002-34

Dear Clerk:

Following are my comments to the proposal for expedited appeals from summary dispositions. Please arrange to have them reviewed by the justices.

One problem with the proposal is that it addresses three causes of delay (late transcripts, long briefing deadlines, and tardily issued opinions) without addressing what may be the most important cause of delay: the Court of Appeals sitting on the appeal between the time briefs have been filed and the time oral argument is scheduled. Addressing the other sources of delay while leaving this one untouched assures only marginal improvement in the overall delay problem.

The other main problem with the proposal is its unjustifiable limitations on a litigant's right to present his case:

1. *Overly short deadlines.* While I have no problem with reduction of briefing deadlines to 28 days, and filing of other simple forms to 14 days, a deadline as short as seven days violates due process. While the seven days starts to run on service (i.e., mailing), the U.S. Postal Service has been known to take eight days to deliver first-class mail from Lansing to Grand Rapids.[1] Thus, the deadline will have run before the other party knew he had to respond. Even when the mail goes faster, seven days is inadequate. To take a typical case, a motion mailed on Tuesday may reach its destination on Thursday. Since trial attorneys are usually tied up in hearings, he will not see the motion until Thursday night. If he has nothing else going on (an unrealistic assumption), he may

[1] This according to an affidavit filed by defense counsel in an appeal I am currently handling.

draft his motion on Friday. Since typing something on the same day it is dictated is rarely possible (secretaries, no less than attorneys, rarely have the luxury of twiddling their thumbs until an assignment comes in), the attorney will not get the typed answer back from the secretary until Monday. Any corrections will delay mailing until Tuesday; but even if there are no corrections, and the answer goes out on Monday, it still will not be received by the Court until Wednesday, *one day late.*

In short, given the realities of office procedures and the typically poor performance of the USPS, a seven-day deadline is per se unreasonable. Since, moreover, increasing a seven-day deadline to 14 days is not going to add significantly to the delay in a months-long appeal process, the seven-day deadlines should be replaced with 14-day deadlines. In the alternative, the rules should be changed to start the deadline running when a document is *received* by the respondent and/or require documents to be *postmarked* by the deadline. That would spread the risk of tardiness by the post office, rather than imposing it entirely on the respondent.

2. *Limiting brief length.* A motion for summary disposition requires a party to put on his entire liability case, which often may take a week to try. Boiling that information down to 50 pages of brief is difficult enough; requiring it to be limited to 20 pages in effect requires an attorney to violate the Canons of Ethics, by inadequately presenting his case. Since, moreover, the additional time required to review a longer brief is a drop in the bucket compared to the months it takes to hear an appeal, it is evident that shorter brief lengths must be motivated by something other than a desire to reduce delays.

3. *Eliminating reply briefs.* Reply briefs have been one of the few improvements that have come out of the excessive number of appellate court rule amendments. Knowing that the other side has an opportunity to reply discourages an appellee from overstating his case, and permits the tying up of loose ends the Court of Appeals might otherwise trip over. Here again, when one considers the minimal procedural impact of reply briefs (currently limited to ten pages, and due within 21 days; which could be reduced to 14 days), it is hard to see how speeding the process can justify the damage to correct decision-making that would result from eliminating reply briefs.

It is bad enough that a party must run the gauntlet of summary disposition before being granted his constitutional "right" to trial. It is unconscionable that one who has been forced to fight with one arm tied behind his back at the trial level[2] is treated even

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[2] Summary disposition forces a party to

- hastily assemble his evidence long before the time set for trial;
- rely on depositions done for discovery purposes, and which consequently rarely adequately address the issues raised in a summary disposition motion;
- rely on evidence that is otherwise incomplete because discovery is not complete (despite the manifest unfairness of granting summary disposition before discovery

worse on appeal.

Yours truly,

John Braden

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is complete, there is no court rule prohibiting it, and hundreds of cases where it has occurred);

- use a cold record rather than live testimony, which lends credence to liars, both because people tend to give more respect to the written word, and because it is harder to assess credibility on a cold record (though judges are not supposed to assess credibility on a motion for summary disposition, some legal rules, such as burden-shifting in employment cases, effectively require the judge to accept a defendant's contentions).
- have his case decided, not by a jury of his peers, but by a judge, whose background (wealth, former defense lawyer, jaded cynic) biases him against the plaintiff.